

UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF NEW YORK

Case Nos. 08-13555(JMP) and 08-01420(JMP)(SIPA)

Adv. Case Nos. 09-01177 and 09-01178

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In the Matter of:

LEHMAN BROTHERS HOLDINGS, INC., et al.,

Debtors.

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In the Matter of:

LEHMAN BROTHERS INC.,

Debtor.

- - - - -x

LEHMAN BROTHERS HOLDINGS, INC./

LEHMAN BROTHERS SPECIAL FINANCING, INC.,

Plaintiff,

-against-

LIBRA CDO, LTD.,

Defendant.

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(cont'd. on next page)

1 U.S. Bankruptcy Court
2 One Bowling Green
3 New York, New York
4

5 August 26, 2009
6 10:04 a.m.
7

8 B E F O R E:

9 HON. JAMES M. PECK

10 U.S. BANKRUPTCY JUDGE
11

12 CASE CONFERENCE
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HEARING re Debtors' Motion to Engage Citadel Solutions LLC on
an Interim Basis [Docket No. 4717]

HEARING re Motion of Lehman Brothers Holdings Inc., et al. for
Authorization and Approval of Settlement with Lehman Re Ltd.
[Docket No. 4716]

HEARING re Debtors' Motion for Authorization to Implement
Alternative Dispute Resolution Procedures for Affirmative
Claims of Debtors Under Derivative Contracts [Docket No. 4453]

HEARING re Debtors' Motion for an Order Enforcing the Automatic
Stay and Holding Shinsei Bank in Contempt for Violating the
Automatic Stay [Docket No. 4764]

RE: SIPC PROCEEDINGS:

HEARING re Second Application of Hughes Hubbard & Reed LLP for
Allowance of Interim Professional Compensation for Services
Rendered and Reimbursement of Actual and Necessary Expenses
Incurred from February 1, 2009 through May 31, 2009 [Docket No.
1292]

1 the motion and given the fact that there were no objections, we
2 would request that the Court approve the settlement and enter
3 the order as modified.

4 THE COURT: The settlement is approved. And I will
5 enter the order in its modified form.

6 MR. KRASNOW: Thank you, Your Honor. Your Honor, we
7 now turn to the reason why this courtroom is crowded today.
8 We'll do the contested matters. The first matter on the
9 calendar, contested matter, relates to the proposed alternative
10 dispute resolution procedures proposed by the debtors. And I
11 turn the rostrum over to my partner, Mr. Gruenberger.

12 MR. GRUENBERGER: Good morning, Your Honor. Peter
13 Gruenberger, Weil, Gotshal & Manges, for the debtors.

14 THE COURT: Good morning.

15 MR. GRUENBERGER: Our motion requests the Court to
16 order implementation of a set of alternate dispute resolution
17 procedures, including mediation, governing derivatives
18 contracts in the money to the debtors. No one can seriously
19 question, Your Honor, that dealing with the vast number and
20 considerable complexity of the derivatives contracts here
21 presents a challenge, a challenge for all the important
22 constituents in these cases: the debtors, all derivatives
23 counterparties, indenture trustees, the unsecured creditors'
24 committee, and above all, the Court.

25 The challenge is to come up with a workable process

1 apart from the filing and prosecution of hundreds of adversary
2 proceedings, one that offers a reasonable alternative for
3 resolution of disputes that surely will impact many of the
4 6,000 or more derivatives contracts under which the debtors had
5 more than 900,000 transactions with hundreds of different
6 counterparties.

7 We believe that in conjunction with the creditors'
8 committee, we have succeeded in presenting a feasible and fair
9 ADR process. It goes without saying, Your Honor, that debtors
10 have a fiduciary duty to maximize the value of their assets
11 embodied in the derivatives contracts in a manner that promotes
12 expedition, avoids unnecessary costs and waste of resources,
13 and at the same time, reduces burdens on an already burdened
14 Court. Reliance wholly on adversary proceedings virtually
15 guarantees such draconian outcomes.

16 Our proposed ADR procedures do just the opposite. One
17 may ask, will our mediation proposal eliminate all adversary
18 proceedings? No. It will not. But these ADR procedures
19 demonstrably fall within the acceptable range of
20 reasonableness, a path that promises to reduce the number and
21 variety of adversary proceedings that are certain to swamp this
22 Court's calendar for years to come, in the absence of an ADR
23 process. Are debtors' ADR procedures including mediation a
24 perfect fix, where one size fits all? No. They are not
25 perfect, because there are just too many and too diverse a

1 population of complex transactions, contracts and issues that
2 would permit a perfection.

3 One example only suffices to demonstrate the
4 schizophrenia exhibited by objectors in their attack on these
5 ADR procedures. One segment of them argues that the Court
6 lacks power to order mediation in the absence of a pending
7 adversary proceeding, while another segment argues
8 simultaneously that the Court should refrain from ordering
9 mediation for any dispute that is or may become the subject of
10 an adversary proceeding. No set of procedures, Your Honor,
11 could be crafted to satisfy such contradictory positions.

12 In an atmosphere where objectors clamor for a
13 personalized, hand-tailored process that takes into account
14 only their particular needs, nothing could make every party-in-
15 interest happy. In this prevailing climate of NIMBY, not in my
16 back yard, no perfect fix is possible; and impossible, also,
17 where parties feel, without constraint, to file unauthorized
18 surreplies last night, as one did after 6 p.m., to place phone
19 calls later last night, and sending e-mails as late as this
20 morning, as three objectors did, still seeking exclusion from
21 the ADR procedures, for their own asserted special reasons.

22 One cannot create any system for these folks, much
23 less a perfect one. But fortunately, Your Honor, perfection
24 for everyone is not and cannot be the standard. In filing this
25 motion and the initial proposed orders, debtors tried their

1 best, in conjunction with the creditors' committee, to fashion,
2 from the outset, a reasonable set of procedures. And
3 reasonableness not perfection is the test.

4 Starting promptly after we filed this motion on July
5 20th, debtors modified their initial proposed order that was
6 attached to our motion four separate times in order to
7 accommodate counterparties who took the time and made the
8 effort to contact us with helpful suggestions. My declaration
9 and Exhibits A, B and C attached thereto, which accompanies
10 debtors' omnibus responses to the objections, details the
11 specific efforts debtors undertook that resulted in the twenty-
12 two or so negotiated modifications we made to the proposed
13 orders, with the help of the committee and its constituents,
14 reasonable counterparties. Our joint efforts led to many
15 potential objectors to refrain from filing any objections and
16 caused several objectors eventually to withdraw all the
17 objections they filed.

18 These cumulative changes, Your Honor, are reflected in
19 the revised proposed order, which is attached to debtors'
20 omnibus response as Exhibit B. Debtors and the creditors'
21 committee believe that this revised proposed order represents a
22 compromise in the form of a well-balanced and fair set of
23 procedures that does nothing to skew the ability of any party
24 to negotiate and mediate its disputes, evenhandedly, on a level
25 playing field with the debtors.

1 Mediation procedures similar to the ones we've
2 proposed, Your Honor, were ordered by Judge Gonzalez in Enron
3 and by Judge Gerber in Ames. In Enron, for example, the
4 mediation of seventy-seven large derivatives contract disputes
5 resulted in a settlement rate of one hundred percent. That
6 brought into the Enron debtors' estates over 600 million new
7 dollars, with respect to in-the-money claims, and resulted in
8 the expungement of some 2.5 billion claims against the Enron
9 debtors' estates.

10 So mediation really does work if, but only if, Your
11 Honor, parties approach it with open minds. And we mean
12 mediation as we propose it here, which includes: mandatory
13 good-faith participation, with nothing binding unless
14 settlement is reached voluntarily; utilization of respected
15 mediators, not connected to any party; preservation of the
16 rights and remedies of all parties which remain unaltered
17 before, during and after mediation, even if settlement is not
18 reached. The same rules and requirements will apply equally to
19 all parties. Confidentiality will be maintained throughout.
20 Mandatory attendance by principals with authority to settle
21 will be required, but video conference attendance may be had.
22 One hundred percent of mediators' fees will be borne by the
23 debtors.

24 The remaining objections, Your Honor, were filed by
25 about fifty counterparties. They should be overruled in toto

1 as they lack merit for many reasons. Debtors' omnibus response
2 attaches as Exhibit A thereto a table of objections and
3 rebuttals thereto in which we specifically rebut, one by one,
4 each of the remaining objections. And our omnibus response
5 rebuts category by category, the remaining objections.

6 I trust that Your Honor does not wish me to cover here
7 each specific objection or even each category of objection and
8 our rebuttals thereto? That could take days.

9 THE COURT: You're right. You're absolutely right. I
10 don't want you to do that.

11 MR. GRUENBERGER: Thank you. And of course, I will
12 endeavor to answer any questions Your Honor may have. But as
13 to these remaining objections, I would note briefly, the
14 objections contain certain fallacies, indeed, fatal flaws, that
15 debtor highlight starting at paragraph 12 of our omnibus
16 response. The primary inherent fallacy results in the failure
17 of objectors to recognize that negotiation and mediation
18 presents an opportunity, an opportunity to achieve cost-
19 effective alternatives to litigation, which guarantees only
20 long delay, huge cost, and added burden for Your Honor.

21 These flaws adhere in part on a misunderstanding of
22 the Court's power to order mediation, and that's due to
23 objectors' misreading of the standing mediation order, which is
24 Amended General Order M-143, which governs in this district.
25 Objectors also seem to be ignoring section 105(a) of the

1 Bankruptcy Code, which provides the Court with the inherent
2 power to issue any order necessary or appropriate to carry out
3 the provisions of Title 11, including control of its own docket
4 and to order sanctions after notice and hearing. And we cite
5 cases at paragraphs 10, 21 and 22 of our omnibus response to
6 that effect.

7 In conjuring up every evil imaginable, some of these
8 objectors also misread the proposed order itself. That order
9 prejudices no party. No party's rights are adversely impacted
10 by participating in ADR. No decisions are rendered by anyone.
11 No party wins or loses in mediation, and no party or the
12 mediator can force a settlement on any party.

13 Another underlying fallacy is the objectors' unfounded
14 presumptions that debtors will act in bad faith. It is
15 illogical of them, however, to presume that debtors will misuse
16 mediation and thereby act contrary to their own best self-
17 interest by willfully forcing needless litigation. No such bad
18 faith does or will exist.

19 Another flaw involves objectors' belief that their
20 views are infallible on questions of contract interpretation
21 and application of the Bankruptcy Code, including the safe
22 harbors. These misapprehensions result in objectors
23 presumptuously placing on themselves the Court's robes, and in
24 that guise, rejecting even the possibility that a competing
25 interpretation of law or contract or a different view might

1 exist.

2 It is telling, Your Honor, that not one of these
3 fifty-some-odd objectors has come up with a single alternative
4 proposal for handling any of these complex matters other than
5 adversary proceedings. So the objectors give Your Honor a
6 clear invitation for you to now engage in premature mini-trials
7 over every word in our ADR procedures. This is not, Your
8 Honor, the proper time or place for hearing arguments and
9 holding mini-trials on questions dealing with issues such as in
10 personam jurisdiction, scope of the safe harbor, specific
11 contract interpretation, indenture trustee authorization to
12 settle and the like.

13 These issues should be mediated once the Court puts in
14 place ADR procedures. Should debtors commence a mediation with
15 respect to a counterparty or an indenture trustee, such issues
16 should be raised in a response to an ADR notice which triggers
17 a mediation. And if necessary, that party or trustee always
18 has recourse, ultimately, to seek withdrawal from mediation, by
19 application to the Court for cause shown, as permitted by the
20 standing order. That is when issues of this sort would be ripe
21 for determination by the Court upon an adequate record. That
22 record does not exist today, and at this juncture, this Court
23 should not hold mini-trials that these parties are demanding.

24 By the way, Your Honor, it's interesting to note that
25 only fifty objections in a case involving 6,000 contracts is a

1 very, very small number. That I think reflects the reality
2 that the vast majority of counterparties has no problem with
3 these ADR procedures, as we propose them.

4 As to objectors' challenges to the participation
5 rights of the creditors' committee in the ADR process, we will
6 leave rebuttal on those matters to the committee, with whom we
7 agree, and at whose responses to the objections we join.

8 Finally, Your Honor, as to the matter of mediators.
9 Debtors are quite content to leave identification of specific
10 mediators to the Court in the exercise of its sound discretion.
11 Although we do suggest that the Court consider appointing three
12 or four mediators in number in order to accomplish the salutary
13 goals of our motion. Thank you.

14 THE COURT: I have a couple of --

15 MR. GRUENBERGER: Yes, Your Honor.

16 THE COURT: -- questions.

17 MR. GRUENBERGER: Certainly.

18 THE COURT: Obviously, the debtors and the creditors'
19 committee have been involved in an ambitious endeavor and in an
20 effort to come up with a set of procedures that will satisfy
21 the particular needs of this case which are, perhaps, unique.

22 MR. GRUENBERGER: We agree, Your Honor.

23 THE COURT: It seems to me that the claims to be
24 mediated are in a category that is, by most people's
25 estimation, complicated, sophisticated and challenging. And I

1 certainly support the notion of the development of workable ADR
2 procedures for dealing with these claims. That having been
3 said, I'm not sure I agree with you that fifty objections
4 represents a small number. It may be a small number in
5 reference to the number of potential parties who might have
6 objected, but it creates something of a difficult case
7 management problem for right now.

8 I have a couple of questions as a result. One is,
9 given the progress that the debtors have made as described in
10 your omnibus response, and the various amendments that took
11 place to the proposed form of order and to the procedures, is
12 it your view that time's up at this point, and that today is
13 the day when an order in the form that you have now developed
14 it should be entered? Or is there some value in spending a
15 little bit more time to try to accommodate some or all of the
16 remaining objections that have not yet been resolved? That's a
17 fundamental question that I have.

18 MR. GRUENBERGER: That is a fundamental and good
19 question, Your Honor. And I would answer each of its parts as
20 follows. Yes, I do think that time is up, only because of the
21 nature of many of the objections. I do not think that I could
22 negotiate with parties who say Your Honor has no power to order
23 mediation. I do not think I can negotiate with parties who say
24 Your Honor has no power to issue sanctions after notice and
25 hearing if a party does not participate in mediation in good

1 faith, according to a mediator.

2 THE COURT: I can resolve those two points very
3 quickly.

4 MR. GRUENBERGER: But that's only two, Your Honor.

5 THE COURT: I know, but I can tell you right now, I
6 acknowledge that I: a) have the power to order mediation; you
7 can do it, frankly, without an order. I can just, on my own --
8 all of this process that you have initiated is all well and
9 good. I could, on my own, create my own monstrosity. I could
10 simply say there shall be mediation, and it will follow the
11 following format. And it may be the subject of some
12 complaints, but I believe I have the power to do it. And I
13 believe that General Order M-143 gives me that power on my own
14 motion.

15 MR. GRUENBERGER: Agreed, Your Honor.

16 THE COURT: I also believe that I have the power to
17 sanction. So as it relates to those two issues that have been
18 bandied about, I can easily swat those down.

19 MR. GRUENBERGER: That only scratches the surface,
20 Your Honor. I don't think I could -- or anybody -- could
21 negotiate with people who say there's no dispute here. There's
22 no dispute. We believe that we've paid exactly what we owe.
23 So therefore, we're out of the ADR, right? And my response to
24 that, as we put forth in our papers, is you're not infallible.
25 You might be wrong. You might be right. We haven't scrubbed

1 every single one of these 900,000 transactions. Why don't you
2 wait to see whether or not we do commence a mediation with
3 respect to your contract, rather than carve you out without any
4 record or any basis? The same for an indenture trustee who
5 says I don't have settlement authority. Well, that may be
6 right, it may not. I don't know, when there are hundreds of
7 indenture trusts here and one indenture trustee says as to all
8 of them, in a brief, there's no settlement authority.

9 Well, if that's so, the ADR process that we propose,
10 Your Honor, allows that response to be made, and if so, we will
11 investigate it. But we can't, in advance, know everything and
12 rebut every one of these characterizations -- that's all they
13 are today. And today certainly is not, and I repeat, and I
14 don't like to repeat what I've said before, today is not the
15 day to have mini-trials on all of these issues.

16 From in personam jurisdiction, no authority to settle,
17 sure, we might negotiate, as we did prior today. Well, two
18 days' notice or four days' notice, yes. But that's a small,
19 small, small tip of the iceberg. The iceberg is huge because
20 the category of contracts is huge; the number of parties is
21 huge. And rather than fight over every word in advance, when
22 we don't have the facts, and we're not going to have mini-
23 trials over these facts, as Your Honor's indicated, we're not
24 going to do that either, what do we do? I don't believe the
25 nature of these allows for that kind of negotiation.

1 The creditors' committee and we, together, handled
2 scores of calls and e-mails. We tried our best. The nature of
3 the objections, as set forth in our table, indicates to Your
4 Honor great diversity of problem-raising. It's very easy to
5 raise problems now, but I think it's much easier, rather than
6 try to resolve all of those in advance, to start the process.
7 Because we'll be here with the shape of the -- this is like
8 negotiating with foreign powers. They will spend days, hours,
9 months, years, negotiating the shape of the table, and never
10 get to it. Let's start lunch at the table.

11 THE COURT: It's a little early for lunch, but I
12 understand --

13 MR. GRUENBERGER: Your Honor, I've tried to answer
14 your question the best way I can.

15 THE COURT: And you have. I understand the point.
16 But what I was actually driving at in part is timing. It's
17 August 26th --

18 MR. GRUENBERGER: Yes.

19 THE COURT: -- a time when civilized societies are at
20 the beach.

21 MR. GRUENBERGER: And the French as well as civilized
22 people.

23 THE COURT: And we're here. We're here in a
24 reasonably well-air conditioned room for a change. And the
25 question that arises is why does this have to happen today?

1 Why does this have to happen before Labor Day? The examiner
2 just gave a status report on timing. He indicated he needs
3 more time. It's a big job that he has and he looked for -- not
4 that I had a problem listening to it -- he looked for more time
5 to complete a herculean task.

6 In some respects this is a herculean task too, it's
7 just a different sort of task. It's designing a structure that
8 will be flawed, that will include imperfections of one sort of
9 another, that will not satisfy everyone, and that can only
10 really be tested in practice.

11 MR. GRUENBERGER: Agreed.

12 THE COURT: The reason I ask the timing question is
13 that we achieved something of value in the context of the proof
14 of claim process that was highly litigated in this case as it
15 related to derivative questionnaires by encouraging parties to
16 meet and confer. It happened in a relatively brief period of
17 time. And various adjustments resulted from that which may
18 not, again, be perfect, but which I think resulted in a general
19 improvement in the overall content of the questionnaire and the
20 procedures applicable to it.

21 And so I have a lingering question as to whether there
22 would be any harm -- and I'm simply asking the question, I'm
23 not encouraging the result -- would there be any harm if this
24 matter were put off to the next omnibus hearing, not for
25 purposes of delaying the process of implementing ADR, as much

1 as for the process of improving the overall structure of the
2 ADR order? And what I'm trying to get a sense of, and I
3 realize that you've answered the question for the debtors,
4 indicating that while there might be some tweaking around the
5 margins, as to the substance, you believe that the remaining
6 objectors are -- not your word, mine -- obdurate --

7 MR. GRUENBERGER: I would say dug-in.

8 THE COURT: -- dug-in. Okay. Both those terms apply.
9 That they're tenacious, and in your view, not particularly
10 well-reasoned. And I'm not characterizing them. I'm just
11 saying that that's -- you view that you're kind of narrowed
12 down to the stubborn, hardcore, that you can't move, and that
13 you're not going to accommodate any further anyway. Is that
14 really where we are? Or are we at a point where some of those
15 stubborn folks, having heard what I have to say, which is there
16 will be ADR, and it will look an awful lot like exactly what
17 you have come up with, if not be exactly that, but I'm willing
18 to give some people a chance to deal with their special
19 situations, so as to avoid mini-trials later. Because,
20 candidly, it doesn't do me that much good to rubber stamp a set
21 of procedures that I know are going to be objected to in the
22 future, and end up with a whole bunch of litigation of parties
23 saying I opt out for the following reason, I opt out for
24 another reason. And I have a docket which is crowded with ADR
25 opt-outs. That's not good either. And I don't know if that's

1 a realistic risk or not, but I'm concerned about it.

2 MR. GRUENBERGER: Your Honor, I was not -- well maybe
3 I was born yesterday, but not late last night. So I will
4 certainly not stand in front of the firing squad and say that
5 today is the magic day, no other day works. Certainly there is
6 nothing magical inherent in today as opposed to September 15th,
7 which I think is the next omnibus date.

8 But I have a suggestion, Your Honor. And that
9 involves, if Your Honor will bear with me for a moment, and
10 hearing from the committee, because I think their views are
11 important. I've told you my views on behalf of the debtors. I
12 think there are many objectors here. If you're suggesting that
13 they come up and argue their position or you're suggesting they
14 come up -- and maybe you should just ask them whether they
15 think that their objections could be negotiated away in the
16 next two and a half weeks. I'm not going anywhere on vacation,
17 so I'll be ready, willing and able to do it. But I don't know
18 if they are. And maybe you should ask them.

19 THE COURT: Well, let's do the following. Most of my
20 questions were rhetorical. I'm interested in hearing from the
21 creditors' committee and to get the view of the committee as to
22 whether additional time might be useful. If it is the
23 considered view of both the debtor and the committee that there
24 would be little purpose served in delay, then we won't delay,
25 unless there are parties-in-interest who represent objectors

1 who come forward and tell me in sufficient numbers that more
2 time could resolve their objections and lead to a better
3 result.

4 If the answer is that more time could lead to a better
5 result, we should take more time. If the answer is that more
6 time is a waste of time, we should resolve it today.

7 MR. GRUENBERGER: I'm all right with that, Your Honor,
8 definitely.

9 THE COURT: Let's hear from the committee.

10 MR. COHEN: Good morning, Your Honor. David Cohen
11 with Milbank, Tweed, Hadley & McCloy here, on behalf of the
12 committee.

13 To go directly to the Court's question as to whether
14 more time may help, we think that there may be some value on
15 the margins. A lot of the objections go to the timing issue
16 and whether it should be twenty days or thirty days or seven
17 days or fourteen days. And I think we could have further
18 discussions that may be productive and may resolve those
19 objections.

20 I think, as long as we have, from the Court -- what I
21 understand the Court to be saying is that there will be ADR in
22 some form; that the ADR will be mandatory; and that the Court
23 has the power to issue sanctions. That gets us a long way in
24 moving forward with resolving some of these objections.

25 THE COURT: I'm saying all those things.

1 MR. COHEN: Correct. The other issue that I think the
2 Court should address today, is that there's a role for the
3 committee to play. There are certain objections that seek to
4 exclude the committee. As part of the process of getting here,
5 we've worked with the debtors for months to come up with what
6 we think are fair and balanced procedures. But reasonable
7 minds can differ. But under the proposed order, there are
8 different ways that a resolution could be settled without
9 further involvement of the Court, one of which is the December
10 procedures order, another is the January procedures order, both
11 of which contemplate the committee's involvement. If the
12 committee were excluded from the mediation process wholesale,
13 then there runs the issue of 9019s in the hundreds coming
14 before the Court. We think that that undermines the goal of
15 minimizing the burden on the Court.

16 THE COURT: Okay. Thank you.

17 MR. COHEN: Thank you.

18 THE COURT: Now, we have a fairly crowded courtroom.
19 And this is not an open casting call. This is rather a request
20 that if there are parties who have been active in this process
21 and who have objected who believe that it is not going to be
22 useful to provide some more time to try to accommodate, I'd
23 like to hear from only that subset, those who believe that the
24 objections that have been raised are objections that are so
25 fundamental that timing is not -- they can't be resolved with

1 some more time.

2 Fine. I think there should be some more time. And I
3 think that it -- I think it makes sense for this to be put over
4 either to the next omnibus hearing date, or alternatively, to
5 find a time prior to the next omnibus hearing date, or after
6 it -- I'm not wedded to September 15th, but prior to may be
7 desirable, just an afternoon when I may have some time
8 available -- for purposes of just bringing this matter to the
9 Court's attention. That way, if there are ongoing resolved
10 objections, there will be, in effect, a pure ADR day in which
11 people who wish to be heard will have an opportunity to be
12 heard, and other matters on the omnibus list will not be
13 affected in the sense of having to wait while listening to
14 matters that they may not be concerned with.

15 So, I'm suggesting that we either put this off to the
16 15th or to some day, if I can find it on my calendar, right
17 before then, so that we can have a time that's just about ADR
18 issues.

19 MR. GRUENBERGER: Your Honor, may I ask three
20 clarifying questions, please?

21 THE COURT: Sure.

22 MR. GRUENBERGER: Thank you. Number one, Your Honor
23 used a phrase a little earlier, opt-out. Our procedures do not
24 provide for an opt-out. The mediation standing order does
25 provide for, after mediation starts, a party may for cause

1 shown ask to be withdrawn. Yes, that is part of our approach.

2 THE COURT: What I meant by opt-out was that -- and
3 I'm identifying the Reed Smith papers that were filed, I think
4 this morning --

5 MR. GRUENBERGER: I think it was 7 o'clock last night.

6 THE COURT: I saw them this morning. And I believe
7 you made reference to those papers, at least obliquely, in your
8 opening remarks.

9 MR. GRUENBERGER: Yes, I did.

10 THE COURT: They argue that an indenture trustee lacks
11 the power to participate in a meaningful way in a mediation,
12 and that without guidance from real counterparties with
13 economics, that they are, in effect, being forced into a
14 wasteful process which they presumably will seek, even if these
15 procedures are approved over their objection, to opt out of. I
16 presume they will do that by filing a motion seeking -- I'm not
17 proposing they do this, by the way, but I'm simply identifying
18 something that might be done -- filing a motion or some other
19 pleading that would say we can't participate in a meaningful
20 way in these procedures, and we ask that we not be bound by the
21 order, or we seek reconsideration of the order, or we seek
22 exclusion from the ambit of the order.

23 I'm using that simply as one example. I am neither
24 highlighting that for purposes of emphasizing the value or the
25 strength of their argument, but simply to identify that it's

1 the most recent pleading I read on the subject, and so I'm
2 identifying it as something that may be an example of not only
3 what they have argued, but what others in a similar situation
4 might argue, or that others might argue related to in personam
5 jurisdiction. So all I'm saying is this. I think that there
6 is the risk that in coming up with an order which is
7 acknowledged to being imperfect by everyone involved, that we
8 run the risk of creating problems that could be avoided if we
9 spend some more time thinking about ways around those problems
10 in advance.

11 MR. GRUENBERGER: Your Honor, I --

12 THE COURT: That's the simple reason that I'm
13 suggesting some more time be spent.

14 MR. GRUENBERGER: Certainly. Just on that point, Your
15 Honor. One of the three points I was going to make was, I
16 think there has to be a decision by Your Honor today that
17 enough is enough on filing papers. I mean, filing
18 surreplies -- the BNY called it a reply, but this is our
19 motion. We replied, they objected, we replied, they put in
20 another paper. Now, if that's okay, everybody else is going to
21 put in more paper between now and whenever that date is. And
22 that just makes an impossible burden for us as well as Your
23 Honor. So I think you should put a hiatus on filing more
24 papers. I really do.

25 THE COURT: I'll discuss that point at the end of this

1 phase of the hearing. But at some point, it may be desirable,
2 before the next hearing, that there be a status report
3 concerning progress made in the negotiations and discussions.
4 And so I would expect there would be some more papers, at least
5 papers from the debtors and the creditors' committee,
6 indicating what the next generation of the order looks like and
7 what the remaining durable objections still look like.

8 MR. GRUENBERGER: Fair enough, Your Honor. I was only
9 addressing more briefs in the nature of letters or briefs to
10 the Court.

11 My next point, Your Honor, was going to deal with
12 issues that have been raised by certain of the objectors, and
13 that is that some of the objectors say well, you know, we --
14 you alluded to it partially a little earlier -- we negotiated a
15 bar date order and a questionnaire after some hearings, and we,
16 the counterparties, have to give information in order to
17 support our claims against the debtors' estates. And that came
18 after certain parties in that negotiation and hearing argued
19 that well, what's fair for the goose is fair for the gander,
20 and therefore the debtors ought to supply the same kind of
21 information to the counterparties.

22 That objection was not granted. It was overruled,
23 dropped. And now parties are trying to get in -- the
24 counterparties, through the back door of this ADR process the
25 same objection, that now we have to give to them what they gave

1 us in the bar date questionnaire. The purpose of those two
2 different hearings and procedures are totally different.

3 We needed, as debtors, to figure out whether or not
4 the proofs of claim had validity, because if there's no
5 objection, as Your Honor clearly knows, there is presumptive
6 validity. And so in order to object to that, we needed the
7 information. This ADR process provides that we, in an ADR
8 notice, give a brief explanation of our reasons for a demand
9 for settlement. The only burden the counterparty has is to
10 give the same quality of information to support either an
11 acceptance or rejection of that demand, nothing more, nothing
12 less.

13 But now, the delay -- and the delay is okay, it has a
14 good purpose -- is going to bump us up near the October 22 bar
15 date questionnaire date, which is October 22 or 23, I think.
16 But that's okay. But I don't think that by this deferral, that
17 we are going to have to -- I hope not -- automatically default
18 to yes, we're going to give you the same kind of information
19 now, because we never believed that was going to be possible,
20 having Your Honor reject that the first time around.

21 So that's just the point I'm trying to make, is that
22 the burden on us is going to be incredible if parties believe
23 they can do that.

24 THE COURT: Well, Mr. Gruenberger, you've moved into a
25 substantive point. And my suggestion, and it's just that, is

1 that time be spent to try to accommodate parties who have
2 objections as to the form of the order or as to certain
3 procedures that might be adopted to make this less burdensome
4 on all parties.

5 MR. GRUENBERGER: Okay.

6 THE COURT: I certainly wasn't suggesting that the
7 time be used to reopen issues that may be antithetical to the
8 interests of the debtors, although that doesn't mean that
9 people may not ask you for that again.

10 MR. GRUENBERGER: Right.

11 THE COURT: I'm simply talking about something that's
12 very benign, or at least it seemed to me it was --

13 MR. GRUENBERGER: Agreed, Your Honor, and understood.

14 THE COURT: -- which is that maybe if we had a little
15 bit more time, some of the fifty objections would fall away or
16 would no longer be actively pressed, because we would end up
17 with a more perfect order.

18 MR. GRUENBERGER: Your Honor, we will work the phones;
19 we will work the negotiations; we will work the meetings, as
20 best we can, as soon as we can. I promise you that.

21 THE COURT: Okay.

22 MR. GRUENBERGER: Thank you.

23 THE COURT: Fine. Is there anyone else who wishes to
24 be heard at this point?

25 MR. WILLIAMS: Your Honor, if I may?

1 THE COURT: Okay.

2 MR. WILLIAMS: Good morning, Your Honor. Jeremy
3 Williams, of Kutak Rock on behalf of the Nebraska Investment
4 Finance Authority. Your Honor, just briefly. We do disagree,
5 and I apologize for not rising sooner, to the implementation of
6 the ADR procedures, because we believe that as a government
7 entity, we would be exempted from the ADR procedures.

8 THE COURT: I don't know if that's true or not, but
9 I'm not hearing that today. I read the response of the debtors
10 to your objection, which references your Web site as a "quasi-
11 governmental unit." I also understand that -- I'm not really
12 ruling on your position now -- I also understand that you're
13 there for purposes unrelated to the police and regulatory
14 powers of the state, but that you provide what amounts to
15 economic facilitation for business within the state.

16 Whether or not you're covered or not, I don't know,
17 but I'm not going to decide that now. And if I were to decide
18 it now, you would lose.

19 MR. WILLIAMS: Yes, Your Honor.

20 THE COURT: So, sometimes it's better just to stay
21 back. Is there more for now? Anybody else like to come up?
22 All kidding aside, anybody who does wish to be heard in
23 connection with the ADR procedures should feel free to express
24 a general position. But it seems to me that our time today
25 might be better spent moving to other matters on the contested

1 agenda. But I do think that we should establish when next this
2 will be heard.

3 MR. GRUENBERGER: Exactly, Your Honor.

4 THE COURT: My inclination is for this to be put over
5 to the September 15 omnibus date, unless I can confirm a time
6 on my calendar when it can be specially heard before that. And
7 let's move on to other matters on the agenda. But I'm going to
8 ask one of my law clerks to check with my courtroom deputy if I
9 have any available time.

10 One of the problems that I have in September is I
11 basically have no time. I have a very, very full calendar. So
12 it's going to be a question of squeezing it. It may be that
13 for purposes of at least putting a pin in the calendar that we
14 should assume it's going to be the 15th.

15 MR. KRASNOW: Richard Krasnow, Your Honor, for the
16 Chapter 11 debtors. I was going to suggest that I had thought
17 most people in the courtroom really related to the matter that
18 Your Honor just considered. Perhaps it would be less
19 disruptive if there was a recess. But in light of Your Honor's
20 statement, we can turn --

21 THE COURT: Well, why don't we do this. Why don't I
22 go off the bench. Why don't I find out if there's a time that
23 I can do this other than the 15th, because people who are here
24 may want to know what that date is. And I'll come back. And
25 when I come back, I'm going to give everybody time to clear,

1 and then we'll go to the next matter.

2 MR. KRASNOW: Yes, Your Honor.

3 (Recess from 10:59 a.m. to 11:02 a.m.)

4 THE COURT: Be seated. I never should have even
5 thought about another date. The 15th is really the only date
6 that works. My courtroom deputy suggested if I want to start
7 sitting on a Saturday we could do it on a Saturday, but that's
8 not going to work for anybody I don't think. So, the 15th on
9 the omnibus day and anybody who now wishes to be excused is
10 free to leave and then we can move onto the next set of
11 matters.

12 MR. KRASNOW: Your Honor, should we wait a moment
13 and --

14 THE COURT: Sure.

15 (Pause)

16 MR. KRASNOW: Your Honor, bear with us for a moment.

17 THE COURT: I've been bearing with you for almost a
18 year.

19 (Pause)

20 MR. KRASNOW: Your Honor, I think we're ready.

21 Richard Krasnow, Weil, Gotshal and Manges on behalf of the
22 Chapter 11 debtors.

23 The next and final matter on today's calendar is the
24 debtors' motion for an order enforcing the automatic stay and
25 holding Shinsei Bank in contempt for violating that stay. Your